UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

TREVOR BRIEDE,
on Behalf of Himself and all
Others Similarly Situated,

Plaintiff,

Case No. 12-13406

-v-

THE VALSPAR CORPORATION,
dba/aka GUARDSMAN,

Defendant.
_____/

REDACTED TRANSCRIPT

MOTION FOR CLASS CERTIFICATION
AND MOTION TO STRIKE DECLARATIONS

BEFORE HONORABLE MARK A. GOLDSMITH

Flint, Michigan, Thursday, June 19th, 2014.

APPEARANCES:

FOR THE PLAINTIFF: DAVID H. FINK
100 West Long Lake Road
Suite 111
Bloomfield Hills, MI 48304

FOR THE PLAINTIFF: E. POWELL MILLER
MELISSA WOJNAR-RAYCRAFT
950 West University Drive
Suite 300
Rochester, MI 48307

(Appearances, continued):

FOR THE DEFENDANT: PAULA J. MORENCY
JEANNICE WILLIAMS
23 South Wacker Drive
Suite 6600
Chicago, IL 60606

FOR THE DEFENDANT: JESSICA A. SPROVTSOFF
350 South Main Street
Suite 210
Ann Arbor, MI 48104

David B. Yarbrough, CSR, FCRR
Official Court Reporter
(313) 410-7000

TABLE OF CONTENTS

PAGE

Flint, Michigan

Thursday, June 19th, 2014.

At or about 2:27 p.m.

-- --- --

THE CLERK OF THE COURT: Please rise. The United States District Court for the Eastern District of Michigan is now in session, the Honorable Mark Goldsmith presiding. You may be seated. Calling case number 12-13406, Briede versus Valspar Corporation. Counsel, please state your appearances for the record.

MR. FINK: Your Honor. David Fink appearing on behalf of plaintiffs and with me at counsel table is Powell Miller and Melissa Raycraft.

THE COURT: Okay. Good afternoon.

MS. MORENCY: Good afternoon, your Honor. Paula Morency appearing for defendant, the Valspar Corporation and with me at counsel table are my colleagues Jeannice Williams and Jessica Sprovtsoff and with us also today is Mr. Stuart Graff who is the division vice-president for the Guardsman division of the Valspar Corporation.

THE COURT: Good afternoon to everybody. I'll need just one minute here.

(Pause)

THE COURT: All right. I know we have a motion for class certification and we have a motion to strike declarations

and I think you can cover them both in your arguments so you can decide how much time you want to spend on each, so we'll start with plaintiffs.

MR. FINK: Thank you, your Honor. Before I begin, I suppose I should be, I should ask how much time would the Court like us to --

THE COURT: Is three hours a side enough time do you think to cover everything we need to cover?

MR. FINK: Well your Honor, I was kind of hoping for four and-a-half.

THE COURT: There's not much good stuff on TV tonight, I just checked the listings so I'm prepared to go as long as it takes, but to give you some guidepost, why don't we start off with the idea that each side will have 30 minutes to make their arguments on these two issues and I'll give you more time if you need it, but I think that's probably enough to cover the bases.

MR. FINK: Thank you, your Honor. I think that is the case as the Court is aware, this is not meant to be a demonstrative exhibit, but the case is rather adequately briefed.

THE COURT: Right, no, I did read a lot of pages so I think you all pretty well laid out your positions.

MR. FINK: Your Honor, is it acceptable to the Court if I argue from counsel table?

THE COURT: That's fine.

MR. FINK: Thank you. There are two motions pending, but I don't think it's really necessary for us to spend much time on the motion to strike. I think that that was well briefed. We filed a reply brief, but I think it's pretty straight forward. The facts are the facts and they're very clear. If the Court compares the deposition of Mr. Graff to the affidavit of Mr. Graff, there seems to be little doubt that that affidavit is attempting to correct and embellish answers beyond what is acceptable in terms of an offer of proof that's not subject to cross-examination.

With respect to Kerry Lawless, Mr. Lawless, it also seems very clear and I'm not so sure that they really respond effectively to this at all that his name and his title, the director of furniture protection plan sales, was never disclosed. Had it been, we absolutely would have taken his deposition. We were looking for the person who could answer the kinds of questions that they purport to answer in the affidavit. Now they don't have much bearing it turns out on class certification because of the ultimate issues that are before the Court, but it was troublesome and therefore we filed a motion in that regard. I will say there's very little question that when we asked in the interrogatories for witnesses who could support their claims or denials with respect to the answer that they filed, there seems to be little

question that in advising us that in answering -- I'm sorry, there seems -- I'm trying not to get into the weeds on this one, but I can't help myself so I'll just say it very quickly.

In the Complaint in multiple places we allege that the protection plans are provided to consumers only after their purchase and they deny that, but they never advised us that Mr. Lawless is somebody with information on that and now they claim he does have information. In they event we'll put that aside because the closer we looked at it and frankly as I was preparing for oral argument, the more clear it became to me that for the most part their affidavits, while bothersome in terms of the volume, are rather irrelevant to the issues that are really before the Court and that really gets us to what is and isn't pertinent to this class certification motion.

The merits of the case are pled extensively in the defendant's briefs. They spend a lot of time talking about what a good company it is, talking about the positive things they've done, but their arguments regarding the merits do not address in any meaningful way the issues this Court really has to decide; numerosity, commonality, typicality, adequacy of representation, predominance of common issues over individualized issues and then ultimately the superiority of the class action device. The merits determinations and arguments that they make though do raise a fascinating question. If the defendants really are that certain and that

confident that they can and should prevail on a Rule 56 motion on the merits, then they should and we would expect that they would embrace class certification. [redacted] class members would have the determination that the defendants apparently think they should have; that is, the defendants could get a judgment from this Court if a class is certified. They could get a judgment from this Court supporting the arguments that they're making on the merits. Now I don't really believe they're as confident as they've suggested that they are because we know what the facts are and I want to talk about them, but only in the context of the elements of and the issues that are pertinent to class certification.

THE COURT: Well, let me ask you. Would there need to be any significant additional discovery to get to the point where a summary judgment motion could be filed?

MR. FINK: No. No, I haven't consulted to be able to answer exactly what discovery remains, but I don't, umm, I don't really think that we would need much discovery at all.

THE COURT: Now some courts make the summary judgments motions due along with the class certification motion to address an issue that you're bringing up which might make some sense in this case. What would be wrong with deferring the class certification motion until motions for summary judgment could be filed and get an assessment really of the merits of the claims so that those merits could be analyzed

along with the issue of class certification? Would there be anything wrong from the plaintiff's perspective in doing that?

MR. FINK: I, I apologize, your Honor, but I can't read the note that I should be able to read.

THE COURT: You want to consult with your co-counsel?

(Pause)

MR. FINK: Turns out it was something I knew already. Your Honor, I guess I'll answer only in the context of our expectations and our experience in seeing these cases through. It is not at all unusual that after class certification is granted in a case like this where we think it's fairly clear it should be granted, but after class certification is granted, that creates an opportunity for the parties to sit down and try to work something out and avoid an absolute win/lose for the defendants and by doing that, it's more common that these cases are resolved.

Now that may be a very pragmatic answer to the Court's question. We don't think summary judgment's going to be a close question, we think it's going to be pretty straight forward. Facts are what they are, the documents are what they are and it doesn't seem at all unlikely to us. Nothing much has changed since this Court issued its opinion and order on the motions to dismiss, the big change of course is that at that point the Court could only address the allegations that were made. It turns out we can prove all of those allegations

so we're pretty comfortable going into Rule 56 that this won't be a close question. I can't speak for the defendants on that. That said, I think it's more common at least and although not, not exclusively done this way, but it's more common that class certification is determined before the Rule 56 ruling.

THE COURT: Well, I would agree and I would venture to say that it's probably the case where there's significant additional merits of discovery that would have to take place that you would defer the dispositive motion phase of the case, but if what we have here is a case that doesn't really require any significant additional merits discovery, then it seems like this might be a good occasion to invoke the exception rather than the rule.

MR. FINK: Your Honor, the traditional answer to the Court's question is that Rule 23 suggests and states that at an early practical time, the Court determines whether to certify the action for a class certification and of course the corollary is Rule 56 generally lags behind the completion of merits discovery. I can't argue with the logic of what the Court's saying right now that it is in fact in a case in which limited amount of discovery is necessary, perhaps you'll hear otherwise from the defendants, but with a limited amount of discovery that's necessary, this is a case that could come up for Rule 56 presumably fairly quickly, but the determination of class, the determination of certification of the class itself

significant, would very significantly advance the litigation and reset the positions of the parties so that they could try to resolve the matter. That is my guess. I don't know that and I do know that if that didn't happen, we would follow fairly quickly with a Rule 56 motion, so --

THE COURT: All right. I hear what you're saying.

MR. FINK: So I'm going to go fairly, I think I should probably go fairly quickly through the elements because I think they're fairly straight forward. Numerosity in a case where you've got [redacted] plan participants seems fairly clear, but defendants argue that the problem we have with numerosity is that there's an ascertain-ability issue that if you have -- it's difficult to, they say, to ascertain who's in the class and therefore we don't know if we meet numerosity. Of course, with these facts I'm not certain how they can make that argument because they rely upon cases like the Rombareo (phonetic) case which the Court has seen before and the case that involves income disability and there, there were significant individual determinations. They were trying to establish a nationwide class for people who were denied income disability benefits and in that context, the Court said correctly that in order to determine if somebody belongs in a class regardless of what the policies and procedures of the insurance company are, to determine who belongs in that class, you have to first determine whether an individual is qualified

for disability benefits and that's obviously tremendously factually intensive, an individualized question. Here, we're talking about the same plan for millions of people and the terms of that plan are available to the Court, very understandable in terms of the legal issues that we're making, the arguments that we're making. When I say understandable, I don't mean the plan itself is understandable, but the issues we're addressing are, but most importantly the issue of who is in the class is not complicated at all.

Not only is there an objective determination of who purchased a plan, but they must and do keep records on anyone that owns a plan and they also keep records on these other supposedly individualized issues that they addressed such as whether somebody received a benefit, whether somebody received a refund. All of those things are ministerial. They can easily be addressed. If the Court concludes that there's been unjust enrichment, but that an individual that received any kind of benefit, that that amount has to be reduced or taken, no problem at all and in any event, that's really a damages issue, that's not really an issue in identifying who are the members of the class and I don't think, I won't spend more time on numerosity. It seems awfully clear that we've got [redacted] plan-holders that numerosity and by the way be do give a chart for every state because we do have the four states in which we're seeking state class actions under the Consumer

Protection Act, so and you're dealing even in the state with the fewest plan-holders, you're dealing with hundreds. There's no circumstance where you get below hundreds of people who are members of or would-be members of these classes.

So the second issue and again I have to start, your Honor, I'm primarily focused, but I obviously need to discuss each of the classes. My argument, I've discussed in terms of the nationwide class that we seek or we're looking for class with respect to unconscionability and unjust enrichment, but each the four state classes that we seek relate to Consumer Protection Act. So the issue, the argument on numerosity isn't different for the two of them, it's really very clear whether it's a state or a federal claim or United States class that we're looking at, it's very clear that there's no barrier, there's no complication getting to numerosity.

Now common issues, that's obviously, commonality is an issue that the Court, courts always have to address very closely if they're making a determination on class certification.

In this case, on unconscionability and unjust enrichment, the common issues which we've identified and detailed in the brief are not just extensive, but those common issues are really dispositive of most issues, probably all the issues for liability and even in many cases it will resolve damages also. So as far as the common issues, with the issue

of unconscionability as the Court is well aware breaks down into two categories, procedural unconscionability and substantive unconscionability.

With respect to the procedural unconscionability, the defendants do argue rather extensively about one of those issues. One procedural unconscionability issue that they argue about extensively is whether or not the plan is made available to the consumer before the sale. Now at best they can say that there are some cases in which that occurs. They certainly don't a claim because they couldn't that it always occurs.

THE COURT: Well they claim that's their policy, right?

MR. FINK: Well, they claim that it's the policy to encourage it, but not to require it.

THE COURT: I thought it was their policy as they claim to require it, all the dealers to make the plans available.

MR. FINK: I'm sorry, your Honor, that's correct, but they've also indicated that available includes being in the back room in a drawer so that if a consumer requests it, it's provided, but they do not have a requirement that it be posted, that consumers be advised of its existence, that consumers be told how to obtain it, but if somebody requests it, yes, it is made available, or they say it's made available. We'll have to assume that's true, but here's what's important. That's one

issue on procedural unconscionability.

Another issue on procedural unconscionability which they sort of address and it's only other one that they sort of address is the issue of the failure to put in bold letters and highlight the key terms of the contract. Now they go to the trouble to actually putting bold and large font some of those words right in their brief, but significantly those are the headings, that's all they are so it might say what is covered and what is not covered, but what they don't bold is the classic fine print and the classic fine print here is where it says that it's in their discretion to decide what they will do. The Court has seen the language already, but right in the contracts where it says they may do this, nothing ever says that they shall or they must, that they may do this is in the fine print. It's in the fine print that they're told, that the consumer is eventually told that the obligations of Guardsman even if Guardsman does decide that it's a covered claim, can be satisfied by providing advice, advice on the phone, could be all that's provided by this so-called protection plan or these so-called protection plans.

THE COURT: Did any of the discovery uncover situations where Guardsman refused to do anything but give advice in the face of a consumer demand for some additional efforts such as a technician coming out?

MR. FINK: I'm not sure I heard the last part the

question because the first part the question are there circumstances where all they do is give advice, they freely testified that that happens very often and in fact what the Court will find is that they say there were 500,000 calls and on average apparently in a year and 100,000 forms leading to a technician actually going out or requesting a technician to actually go out, so --

THE COURT: My question is whether discovery uncovered any situations where Guardsman only gave advice when a consumer had asked for some additional effort such as a technician to come out.

MR. FINK: What I now understand is that there are -- they have indicated there are circumstances in which their customer service representatives on the phone will decide that based on the information they have, they will not send out the service request form that then has to be mailed in and when they don't send out that form, then no further service is going to be provided, all and they get is whatever they were told on the phone.

Now we did not break this down into individualized claims and so we didn't, we didn't look for all of the individuals or records of every individual that called and what information they were provided. We haven't gotten to that stage of discovery. We haven't seen that. I don't know that it's ever going to be necessary in this case for us to find

that, but what we do know as the Court knows is that the contract, so-called contract gives them, of course we think it's extraordinarily illusory and provides unfettered discretion, gives them the discretion to only provide advice.

Now the last time we were in court, both plaintiff's counsel and defense counsel I think shared one misunderstanding and that was that the same phrase that says they can get advice says they may get a cleaning supply, something like that. Well, we thought and defense counsel I believe also thought because they didn't correct us on this that those furniture protection kits that they get that I showed the Court that were provided to the consumers and provided to our plaintiff, our plaintiffs then when he purchased the plan, that that was the actual cleaning kit.

Now in fact what we've learned now through discovery is that there really -- that they're not talking about this furniture care kit that they're given at the time of purchase, but they're talking about a follow-up, some follow-up materials that are sent out to them, but what they've explained to us is these are materials that are prepared to be provided for specific types of requests; for example, you've got ink leather or you've got a round circle that a cup makes, a watermark that a cup makes on a wooden table and they'll have specific cleaning kits to address those issues and they've explained those kits cost, some of them cost maybe [redacted]

and at most you're talking about [redacted] for the cleaning kit. It's actually less substantial than the kit that we showed the Court before, the box that we showed the Court before and in effect now they're providing some folks, but we'll get to that at an appropriate time, but your Honor, I want to get back to this procedural unconscionability issue because as I said there's two things they did address; the issue whether in fact the plans are being made available at the point of purchase and the issue the bold lettering in the contracts which again all the Court has to do is look at the contracts and see that the key terms are not bolded and they are not highlighted for anybody to know about things such as how quickly they have to send in their claims and what the processes is for making the claim. All that said though, there are several more issues of unconscionability that they never address and they are fundamental and important issues.

The contract is of course a contract of adhesion. It's a take-it-or-leave-it contract. The consumer does not have a right to negotiate any of the terms. That's always an issue the courts look at. In this case though it's more egregious than that because they can't deny that there isn't even a contract to sign. No consumer is told to review this and sign it because there's not even a place where the plan can be signed. None of these plans is ever signed.

The -- while it's a take-it-or-leave-it contract, to

make that matter worse on unconscionable procedure, we learned something else that we didn't know at the time of the motion for, umm, motion to dismiss and that is Guardsman requires its retailers to offer no competing plan so when the consumer is offered the Guardsman plan, there are never offered an alternative, competing plan which is of course another issue that's often referred to, that courts often look to in terms of procedural unconscionability, the absence of a choice.

THE COURT: What exactly is the relationship of these dealers to Guardsman? Are they just unrelated entities that are considered agents of Guardsman or is there some other kind of relationship?

MR. FINK: Well, of course we do believe that they are agents of Guardsman. Guardsman however says they enter into agreements with these retailers and the retailers then purchase the plans from Guardsman and can mark them up as much as they choose on the resale. The relationship doesn't end there though because obviously and the reason it continues to be an agency relationship is that when the furniture salespeople, the furniture company delivers the plan, they then need to get back to Guardsman because while the sale is done at the retail store, all of the servicing is done, all of the handling of any kind of claim or any future issues regarding the plan is done by Guardsman including in many instances as the Court I think is aware from previous argument, in many

instances the furniture stores don't even provide the plan, the physical plan to the consumer, but instead gets mailed to them by Guardsman or delivered to them by Guardsman. So there's a relationship between the retailer and Guardsman which certainly has many of the components of the agency, but the retailer does independently in one sense sell the product because they can, or the service because they can mark it up at whatever number that they want and they make the choice on whether to give out that furniture kit that we showed you.

THE COURT: Can they change any of the terms of the plan?

MR. FINK: No. The retailers cannot change the terms of the plan. Now it is true though and the reason that Guardsman has said there's a 125 different plans is the different retailers going into the process may negotiate with Guardsman, may work with Guardsman to design different plans for their stores and they've indicated that there are some material differences, but the material differences are things like the length of time that the plan is in place, how much a plan is -- how much is paid for the plan, things like that. What doesn't change in these plans is that Guardsman always has extraordinary discretion in terms of what service they'll really provide and Guardsman makes the determination in every instance as to whether a service is going to be provided at all, but yes the retailers, some of the retailers will work

with Guardsman to describe slightly different plans, but the key terms, the ones that are pertinent to substantive unconscionability which I guess we should talk about now, but the ones that are pertinent to substantive unconscionability don't really vary among these plans.

Guardsman makes the decision. Guardsman imposes the requirements that a claim has -- that a form has to be sent in even though it's not clear in the document and it's not highlighted in the documents when they first get these, when they get the plan. Guardsman maintains and preserves for itself a level of discretion that essentially makes this contract an I'll-do-it-if-I-want-to contract and that's true of all of the contracts that them.

Now I would say this. I think it's worth acknowledging that now they're trying to come forward and try to find among these 125 contracts, find a contract here or there that says Guardsman will do something. Now there's very few of them, but there are some references to Guardsman will did this in certain circumstances and if in fact this case goes forward, when this case goes forward, it is possible that they will be able on the merits to make a showing that certain of these plans, but I'm not -- I tend to be skeptical, but that certain of that's plans do provide some quantum of value to the consumer and if they do, obviously that's going to be relevant to unjust enrichment. Basic terms though remained the same,

contract, from one contract to another and while the basic question of whether -- I'll talk faster, your Honor.

The basic question of whether or not there are any contracts that provide value which again they're trying to put before the Court, they've already testified that in these contracts where they have the option to just give advice, that they may meet all of their requirements by just providing advice on the phone. They're comfortable when they exercise their discretion, they've done the right thing and they're comfortable with it and that's --

THE COURT: Why would that be necessarily wrong?

MR. FINK: Because it wouldn't be wrong in any one instance. It's wrong because in all of these contracts with respect to all of these agreements, Guardsman retains the discretion to make the decision whether they're going do anything at all and they can meet the terms of this contract by doing nothing at all or by just giving a quick answer on the phone. That's what makes these contracts --

THE COURT: Well, they're not taking the position that they've fulfilled the contract if they do nothing, are they? Aren't they saying that they always do something? Aren't they saying they evaluate a claim and decide what sort of response is appropriate such as advice if it's a matter that they think can be handled with that kind of response or something more aggressive like sending out a technician or

replacing the merchandise if it comes to that or offering a refund? I don't think they're taking the position that they can do nothing, are they?

MR. FINK: No, no, no, to the contrary. They're saying that they treat these as contracts that require them to do something things. It's just not true and in many instances as we are already aware, if they get a dissatisfied customer and they can't satisfy him, ultimately they just offer him a refund on the contract. We had this whole argument about that issue before. You're not satisfied with the way we're doing business, fine, go do business with somebody else, but by then they've already paid for the insurance, held the ins -- so-called insurance, held this for a long period of time and they get no value from it at all.

The fact that Guardsman might choose to be a good corporate citizen, the fact that Guardsman might profit or might feel that they profit by conveying a positive image in the retail community doesn't take away from the illusory nature of the agreement. The contract is illusory if it doesn't require performance by one of the parties and that is clearly the case here. The fact that they may gratuitously provide some benefits to people because it's in their financial interest and they trumpet the fact that it's [redacted] although they don't trumpet the fact that they had over [redacted] in collections for these or revenues from these

plans, but it doesn't matter. If they get [redacted] in benefit, it's still an illusory contract.

THE COURT: Well, how is it illusory if they believe that they're under a good-faith obligation to address every claim that's submitted? I understand your argument that maybe the language doesn't capture that obligation because it doesn't say anything about a good-faith requirement to address these claims, but they're taking the position that that's how they interpret the contract. Is it illusory if Guardsman operates in that fashion and believes it's committed to providing a good-faith response to every claim?

MR. FINK: Yes because the determination of whether a contract is illusory is not a subjective determination. It's not based on how did the parties treat the contract or what did the parties think was in the contract, it is what does the contract actually require.

THE COURT: Well, what about the doctrine of practical construction? Don't we also take into account how parties actually operate under a contract? I would agree it's no what you have going on in your brain, but if over a period of time you've operated under a contract in a certain fashion and then manifest publicly in court documents that that's how you understand this contract to operate, then doesn't that become part of the interpretive evidence that a Court could consider?

MR. FINK: The Court is absolutely correct in the context of -- oh, first of all the Court is always absolutely correct.

THE COURT: Until I'm reversed. Then I'm absolutely wrong.

MR. FINK: If you do make a mistake, hopefully three, three nice people will correct it, but the issue and the principles that you address in terms of the course of dealing, et cetera, that arises in the context of ambiguity. That arises in the context of a contract in which it's not clear what the contract does or or doesn't require. These contracts are clear. They give the discretion, so clearly give the discretion to Guardsman that no consumer could bring a direct claim against Guardsman on the contract.

Now we've filed claims on the contract also in this case, but really the stronger and more logical case and we've made this clear to the Court from the beginning is that these contracts themselves are illusory. They are of no value at all because they don't bind the defendant. I, I hear what the Court is saying, but corollary to what the Court is saying is that any good corporate actor no longer is held to the legal requirements related to what you can and can't put into a contract, how can and can't enter into a contract. All of these issues of contract -- of the unconscionability of the procedure of how they formed these contracts, these plans, all

of these issues remain. They're still not letting the consumer see it. They're not encouraging -- I shouldn't say not letting them see it, but they're not automatically making sure the consumer sees it. They're not having consumers sign it. Signing is something we take for granted in society because we do it so often, but it serves as Court knows a fundamentally important purpose in the context of the contract because it forces the person at that moment of sobriety to look down and see what the terms will and won't be and they don't want and won't let their consumers read that all the discretion rests with Guardsman until after they have the contract completed, the sale completed.

THE COURT: But that's a separate issue. That's a procedural unconscionability issue. We were talking more about the substantive unconscionability issue.

MR. FINK: It's correct, your Honor, and --

THE COURT: So let me just stick with that because it seems to me your argument is if a contract provides for discretion as to how a contracting party should perform, that that makes the contract illusory, but don't we have all kinds of service contracts? Attorney/client contracts, for example, involve attorney discretion in how to perform.

MR. FINK: Not a --

THE COURT: Is that an illusory contract?

MR. FINK: Yes. If I said to a client I have an

engagement agreement for you to sign, a retainer for you to sign and that retainer said legal services will be provided by Mr. Fink at his sole discretion, that's an illusory contract.

THE COURT: But what if it says he'll represent you and the manner of his representation will be at his discretion? In other words, what action to take to represent you. Isn't that really the analogy here? Isn't that what Guardsman is saying, we're going to address your claim, we're going to do it in good faith, we're going to side what we think is a reasonable effort to address whatever stain issue or odor issue you present us and here are the different kinds of efforts we might undertake. We might give you advice, we might send out a technician, we might tell you ultimately we can't and we don't think anybody else can fix this problem, we might replace the furniture for you then or we might offer you a refund. Aren't there all kinds of service contracts where it's understood there's going to be some discretion exercised by one of the contracting parties and the limitation of course is that it has to be discretion exercised in good faith and reasonably. Doesn't that take it it out of the, the universe of being an illusory contract?

MR. FINK: Not quite and here's why. I want to go back to the Court's analogy and follow it through. A lawyer who says to a client I will represent you in that litigation doesn't say at the time how many phone calls he's going to

take, how polite he's going to be to opposing counsel and how many depositions there are going to be in the case, but there is a standard of care that that lawyer has to follow and that's why our contracts aren't more detail. Believe me, nobody would trust a lawyer otherwise. The fact is we're all subject to third-party review of what we do and there is a rule of reason in terms of what we do. That does not apply here where you have a commercial agreement and I do want to say this because,I mean, I would actually go, continue this for a long time.

I just have to say though that as I'm hearing this, we're really talking about the merits. We're talking about whether ultimately on a Rule 56 motion or a trial, ultimately can we show that these are unconscionable contracts? Is there some more evidence that we need to provide and can we show that these are unconscionable? Now I think the face of the contract is enough, but this Court not only doesn't have to, but shouldn't make a determination on the merits in coming to class certification. It's not the right order, it's not the --

THE COURT: But aren't there many cases that tell us we're supposed to rigorously analyze the merits, too?

MR. FINK: Yes, and this --

THE COURT: I mean, they have cases that say it's distinct from the merits so we kind of have conflicting signals, but it seems like the most recent signals are that we're supposed to analyze the merits to the extent necessary to

rule on the class certification motion.

MR. FINK: Exactly, to the extent necessary to rule on the motion. In fact and the Whirlpool case in the Sixth Circuit is a very nice opportunity for the Court, for all of us to get some guidance out of some cases from the Supreme Court that may not have been as clear, but the Whirlpool case is really rather clear in terms of class certification, but here is the point. The merits absolutely should be rigorously pursued to the extent that the Court needs to understand whether in fact a determination can be made on the merits for the class and so, for example, in the Comcast case the Court found that while they were seeking a class for damages, there literally was no way that damages could be proved on a class-wide basis and the trial court didn't, essentially acknowledged that and then went ahead and certified the class. If this Court were to find that there's no way that the Court could make a determination that would apply class-wide because of something related to the merits, absolutely that's something the Court should look at rigorously, but this is quite the opposite of that. This is a circumstance in which -- this colloquy relates to the merits of the unconscionability claim and I think we'll be able to prevail. I think we have to prove it, but prove it or not, it's going to be a class-wide determination -- I mean, I shouldn't say it's going to be, it can be a class-wide determination and that's what we need to

present to the Court, that it can be a class-wide determination.

THE COURT: Now let's assume I agree with you on matters of substantive unconscionability, can the same be said regarding procedural unconscionability?

MR. FINK: I don't think so. When you say can the same be said, does the Court mean can the --

THE COURT: That it's necessarily a class-wide kind of determination, that it's either something that applies to all the claimants, potential claimants or it doesn't.

MR. FINK: Yes. Based on the --

THE COURT: Because when you're dealing with substantive unconscionability you have a limited universe of forums and the terms are at least according to plaintiff's view essentially the same and a Court could come up with a ruling says this contract either is or isn't unconscionable, but when it comes to procedural issues, I want your view on to what extent we would get into individualized determinations of to what extent the contract was made available, to what extent did they know that there was another document embodying more elaborate terms. Give me your views on that.

MR. FINK: Your Honor, there are certain aspects of procedural unconscionability that are undeniably class-wide, so undeniably class-wide that they didn't respond to them. The actions of a signature. The fact that the contract is not

subject to negotiation by the party that's purchasing it. The fact that they don't have an option to deal with a different company; that is, to buy a competing contract because the retailers are limited and told they can only sale one company's, they can only sell Guardsman contracts. Those things are class-wide and won't change. We believe -- oh, and certainly the issue what have they bold or don't bold in the contracts, that's class-wide and I don't see how it can change. They found some bold letters and pointed them out, but the key things aren't bolded.

The only issue and the Court has raised it, the only issue that the defendants have put in play regarding procedural unconscionability having individualized issues, the only issue they put in play is the question of whether and how the contracts are made available in advance to consumers. So the -- we believe that we will be able to show the Court that every aspect that we've identified of procedural unconscionability applies including the issue of whether the contract is made available, but ultimately the Court is empowered and will have to look at the totality of the circumstances. For example, if they didn't make the contract available, but it was taught in every elementary school in America that this is what a Guardsman contract is, maybe the Court would come to a different conclusion if looking at the totality of the circumstances, but the fact is here, they've

got some anecdotal examples of places where people do or don't see a laminated copy of the contract or if somebody asks for it, they get to see it, but that's only one issue on procedural unconscionability. We raised eight or nine and they don't even respond to seven or eight of them and I don't think they have a reasonable response, a meaningful response on the issue of bolding or highlighting the key terms so the only the issue that they are trying to put in play is this issue of do the retailers, to what extent do the retailers make this available.

THE COURT: Let me stop you there on the issue of making it available. For our purposes do I need to just determine what their policy is or do we need to actually see what happens in the field as to making it available by the dealers?

MR. FINK: That's a good question, your Honor. In certain extremes of the facts, I think that could play out either way. If for example they had no policy, but we found that every dealer in America has a sign in their window that says here's the plan for Guardsman and then they've blown it up so it's easy to read, that would be one set of facts very different than what we're dealing with here. If they have a policy that says we want consumers to get the contract, but then in fact none of the retailers ever make the contract available, that's a different extreme. We think we're somewhere in the middle of that, much closer to the last

example than the first one and their policy isn't that it must be produced and reviewed by the consumer, it's that it has to be available and of course their lawyers told them you can't have somebody sign something and when they ask what it is say I won't tell you, and that's essentially what we're talking about. If a consumer says we want to see the contract, they've got to have it and they've ought to be able to --

THE COURT: So is it your view that if the company has a policy of directing its dealers to make the contract available, whatever that may mean and some make it available and some don't and I guess you -- I don't know how many dealers there are out there, but there must be hundreds I assume, are we going to have to get into that issue of 35 percent make it available, 65 percent don't make available? Do we have to cover that as part of the class certification process?

MR. FINK: Certainly not part the class certification process. I thought your question is whether we have to go there when we're looking at the merits. I don't even think we're going to need to go there when we look at the merits because as the Court knows in unconscionability, you look at the totality of the circumstances and if the procedural unconscionability is more egregious, at least in certain states and yes, there are variations among the states, but that can be address by the Court, but with something that's as when you have particularly egregious procedural unconscionability on

some issues, you don't have address them all. We chose to raise all of those issues, but we didn't have to address them all. We could have simply come to the Court and said this contract isn't signed by the parties. That's procedural unconscionability right there. This contract is not -- in every state. This contract is not signed by the parties. That's enough and the fact that it might be or might not be available to somebody I suspect in the that the Court might find that irrelevant, but if the Court does find it relevant, you know, we'll provide to the Court whatever factual information the Court needs before a determination on the merits, but for a class determination, look, if they're right, congratulations to them because if the class is certified and then this Court looks at procedural unconscionability and says well, for whatever reason, I can't do it because I can't make a logical argument for it, but if this Court somehow comes to the conclusion, due respect, that there is no unconscionability, well, that's going to be a giant victory for the defendants and they're going to have that victory for [redacted] parties. I don't think it's going to end that way, but I suppose that's one possible outcome.

THE COURT: Well, I want to get back to whether we need to eventually make an individual assessment because let's assume that for purposes of the certifying the class, I just need to make a determination that there's at least one practice

that is procedurally unconscionable and some aspect of the plan that is substantively unconscionable. If we were to proceed then to individual determinations, would the plaintiffs then be locked into just those items that I found were substantiated as sufficient for a class-wide basis or would we perhaps on individual assessments have to determine all eight or nine of the procedural unconscionability issues that you've raised?

MR. FINK: No, it's a class-wide determination and it would be a class-wide determination. We would not have a certified class and then come into the Court and say by the way, 65 of our plaintiffs went into a store that didn't give them the document. We're not looking to complicate this. This is a classic and appropriate class action where we're really only looking for the common issues and we have some answers to the question that I was not perhaps as quick to respond on and that is Mr. Graff who is here today, he's an attorney and he testified for the -- not an attorney for the company, he has a background as an attorney so he's educated. He was asked about the policy of making the documents available and what he said was they have a make-available policy, but they don't enforce it and they don't monitor the stores to make sure that the stores are honoring that policy, so if we need to get to the merits, we can get to the merits, but I think that's for another day. I think that that's, that's down the road. Right now the issue is is there enough here that the Court could make

a determination and again I'm certain that the Court can make that determination without reference to the issue of whether the policy's available because procedural -- I said the policy, the plan, procedural unconscionability is rife through this. No signature. Contract of adhesion. You can't -- I mean, I don't mean to repeat myself, but I guess I do, but the point is there are seven or eight claims of procedural unconscionability that they don't even address. Substantive unconscionability they talk about more.

THE COURT: Okay. Let me give you a two-minute warning so we can hear the other side.

MR. FINK: Okay. Well, then I'm going to go really quickly on some of the other issues and that is unjust enrichment. The contract that these people have obtained is illusory. That's our position. We think we can show that. We think we can even show it with respect to this last policy that we've heard. You talk about illusory, so they have a policy that says we're going to -- I can't help going backwards, but we've got a policy that says that we're going to provide it, but we don't do anything to enforce that policy, but in the end, in terms of unjust enrichment, I'm going to save some time there.

I'm going to say something very painful. It's not painful to the Court, it's just painful to people at this table and that is that we know that unjust enrichment contrary to

some of the cases cited by the defendants, we know that unjust enrichment can be the basis, can form the basis for class certification painful from the, if you'll excuse me, the Belford case. Now we were out of the case by then, but as the Court knows, counsel at this table were involved in that case and this Court made some absolutely accurate decisions on class certification. Easy for me to say today, but the class made very solid decisions on whether in fact it's appropriate to certify a class for unjust enrichment and it's classically appropriate.

Now I'd also call to the Court's attention to Judge Lawson's ruling in Hoving v. Lawyer's Title Insurance Company because I thought he did a real nice job of bringing in a lot of other cases and pointing out the pattern of cases involving unjust enrichment and distinguishing some that are referenced by the defendants. So, both for substantive and procedural unconscionability and for unjust enrichment, a nationwide class makes a lot of sense.

The ultimate, and this is the key. The ultimate -- you don't have to have everything in common, you have to have a common issue and a common issue that will advance the litigation and in here, we have common issues that go right to heart of these claims and actually establish liability if we prevail and we think we'll be able to prevail and show those things.

Now I won't waste any time on typicality. The Sixth Circuit has confirmed in the Whirlpool case that typicality and commonality are very, very close and in this case our plaintiffs are all members of the class and each one of them got one of these illusory contracts -- I'm sorry, David. Each one of them got one of these illusory contracts.

Adequacy of representation, I'm not going to waste a lot of time on that. I think you've got a pretty good group here of lawyers and as far as the class representatives, there is no conflict. They've argued a conflict related to the contract claim, but we've been very clear that that contract claim is in the alternative, that we really believe these contracts should be voided. If they're not voided, then our individual plaintiffs might go forward with the contract case, but they want their contracts voided and they want their refunds. That's not a -- despite the odd quotations they offered from their deposition transcripts, they've all been consistent, they're all on board and they've all said that they want a refund to be made available for the entire class.

Now predominance of common issues, we've got to that already. We go right to the heart of the case here, the heart of the issues that are really before the Court -- oh, I skipped something and I'll do it very quickly, I apologize and that's the Consumer Protection Act claims and I'll just say this, all of those state acts, each one of them clearly encourages class

determination. These are remedial statutes intended to address endemic problems in business.

THE COURT: Are those subclasses to be done or to be certified only in the alternative if the Court doesn't certify a national class or in addition?

MR. FINK: No, in addition. We would also like these four state classes to be certified because the Consumer Protection Act do provide some alternative remedies and some alternative issues of liability and the way they're drafted almost in each case, there's -- they look like they were written for this kind of contract and so we would like to have certification on those four states also. There's fee shifting and other issues in some of them that I think applies, but most importantly it's just additional theories of liability that we would like the Court to look at.

No superiority, I'm going to go super fast on. We argue in our brief, that we say in our brief that we're not aware of another case in the country, nobody on an individual basis, we say we're not aware of any individual who was able to muster the resources to bring a claim against Guardsman and they haven't denied that. So the fact is it goes back to the, this something that Judge Posner said once and it's been quoted by the Sixth Circuit and quoted again by Judge Lawson, the realistic alternative to a class action he said is not 17 million individual suits or in this case [redacted]

individual suits, but zero individual suits. If the class isn't certified, other than our four plaintiffs, nobody is going to come forward to file. They're just going to walk away, take their beating and go home. They're not going to fight this giant.

Now they, it's suggested to us and you found it very interesting they suggest to us that the answer is to go through their claims process and that that's an alternative remedy, but they've even admitted in their pleadings and depositions that -- I'm sorry, in the affidavit that very few people ever prevail on one of those appeals and it doesn't matter because they can't say look we'll handle it in-house, trust us. That's what this whole case is about, trust us. We should trust them to do the right thing on the contract and then trust them to do the right thing on an appeal of the contract. It really doesn't make a lot of sense.

THE COURT: Okay. I'll give you some additional time to reply. Let me hear from the defendant.

MS. MORENCY: Your Honor, in preface -- if the Court can just let me know when you're ready?

THE COURT: I'm ready.

MS. MORENCY: Your Honor, in preface I would urge the Court to keep two things in mind which obviously the Court knows from the Laubert (phonetic) decision and that is the premise of a class action is trial by representation. The

premise is that the trial of the named plaintiff's claims will necessarily adjudicate the claims of others and the plaintiff can't use this device to end run the ability that Guardsman and Valspar has to raise the individual defenses and challenges that it would when faced with an individual claim. So as a result Rule 23 is not a pleadings standard. The time for presumptions as the Court recognizes is over. We're now in the world of real evidence and the burden is on the plaintiff to show that they affirmatively comply with the four elements of Rule 23(a) and one of Rule 23(b) and I think the record before this Court does not satisfy that test.

The Supreme Court and the Sixth Circuit have emphasized the importance of this Court's rigorous analysis of those elements and they do so because of the risk to due process and because of the change in the stakes if a class becomes a class action with all of its attendant notice and expense and risk even before a determination of the merits and sometimes in spite of what the merits are.

THE COURT: Well, what's your view about deferring a class certification decision until summary judgment motions are filed so the merits can be reviewed along with the class certification issue?

MS. MORENCY: Your Honor, I think there probably isn't a way to do that because under Rule 23, the Court is asked to decide at an early juncture whether --

THE COURT: Well, I've seen cases that do that, so there must be a way to do it unless they're all wrong.

MS. MORENCY: Well, they're -- if the plaintiffs them -- I can foresee a way, your Honor, where we would move for summary judgment on the claims by each of the plaintiffs who truly don't have strong positions before this Court, some have no positions, but I think the Supreme Court would probably applying its standard say the Court must first decide what the stakes of the litigation are before deciding the representative claims in order to see if there is a way to decide things on a class-wide basis and obviously there's not in this case. The individualized issues are huge. As Mr. Fink just admitted, there are some plans that have value, one must look at the totality of the circumstances at the point of sale, so I think the most efficient route for this Court in deciding the class certification issue is to deny the motion for class certification and then allow the individual matters to proceed afterward so that we can either resolve or adjudicate them as the facts unfold.

THE COURT: Well, let me ask you this. There are some issues here that seem to be a matter of making a legal judgment about the legal import of words, the substantive unconscionability issues. It doesn't appear that there needs to be any additional discovery on that. Doesn't it make some sense in that context to see whether or not plaintiff even has

a claim before we decide whether or not the case should proceed at all, whether as a class case or as an individual case?

MS. MORENCY: Your Honor, I think it is appropriate to look at this issue of the so-called illusory contract if that's what the Court is referring to.

THE COURT: Right.

MS. MORENCY: Because I really think it is a red herring for today's discussion because the actual, the proof developed in discovery and the actual wording of the plans reveals statements that Guardsman will perform the following and there's a, if you look for example on the very front page of the plan, the plaintiffs always want to look at the right side of the plan at the service procedures, but if we look at the basic commitment of the service contract, it says if a stain or damage listed in the what-is-covered section occurs during the term of this protection plan, Guardsman agrees to provide service as outlined in the service procedures section of this protection plan. There is nothing illusory about that and that is why this company acting in good faith has spent more than [redacted] over the last five years providing cleaning kits in some cases, providing technicians in, to the tune of [redacted], replacing furniture, repairing furniture, sometimes replacing entire suites of furniture. So there's nothing illusory about the actual language that is before the Court although it's been characterized otherwise by

the plaintiffs, but I think the actual language of that paragraph one of the plan is a commitment and under service procedures if we turn to the right side of the plan, the language is if Guardsman determines that the reported stain or damage is covered under this protection plan, Guardsman will perform one or more of the following.

We also know from the uncontroverted discovery that Guardsman has a policy that the consumer drives what relief Guardsman supplies so for example in paragraphs 31 through 36 of Mr. Graff's declaration, he takes the Court through the process so if you have a stain on your couch and you call Guardsman and it's a covered stain, then if you want a cleaning kit or advice you're welcomed to it, but the company also send you a service request form and contrary to the representation made to the Court by Mr. Fink, there was no evidence adduced in discovery of a single example where a consumer asked for relief and was told they could only get advice. It just, in the real world it does not exist and in the real discovery it does not exists, so Guardman's very concrete commitments and the [redacted] it has spent make really puzzling this reference to an illusory contract because it is not.

THE COURT: Well, we're of course getting now into the merits and that's perhaps some support for this idea that if we're going to get into the merits, don't we need to have full briefing on that in the form of dispositive motions?

Because if it turns out that some or all of the contentions that plaintiff is making lack legal merit, doesn't that perhaps either make class certification motion moot if they have no legal merit to any of their claims or narrow really the focus of what I would have to analyze in terms of being class-wide determinations?

MS. MORENCY: Your Honor, I think we have to ask each other what would this motion for summary judgment be on? Would it be a motion for summary judgment on the claims of the four named plaintiffs or would it be a motion for summary judgment on some uncertified set of events that happened to some of the other [redacted] people which raises all kinds of individualized issues and that's discovery we have deferred as the Court is aware until after there's a decision on class certification, so --

THE COURT: Well, I suppose one way to look at it is to say that the summary judgment motions would address all of the grounds of unconscionability that have been raised by plaintiffs and the grounds for unjust enrichment that have been claimed.

MS. MORENCY: Well, your Honor, each the plaintiffs before this Court can only bring their own claim. They would, and so if it's a motion for summary judgment on what happened to Mr. Briede and what should be the resolution on the merits of his claim, if there are disputed factual issues, then let's

think about where that takes us. He can't address -- he can't present to this Court a claim of general illusory nature or procedural unconscionability that didn't happen to him, so I think really the most efficient way to address this is first to decide can the issues presented to this Court, unconscionability and unjust enrichment, be decided on a class-wide basis and I submit that they cannot and then after the determination of whether class certification is proper or not, then in this case we can address if it's four individual claims, we can address those. It probably wouldn't even involve briefing or a trial because the parties would be resolving that.

THE COURT: Well, you're eventually, assuming there's no settlement, you're going to be addressing dispositive motions at some point. It's just a question of when you do it. Let's assume I certify a class here, you're going to be filing I assume a dispositive motion, would you not or would you just move on to some kind of adjudication on the merits, some kind of trial issue?

MS. MORENCY: Well, the Court asked a telling question because one thing every appellate court that looks at this examines is how can this case be tried because for due process reasons, Guardsman and Valspar cannot be stripped of the due process right they have to answer the claim or complaint of any of the [redacted] people who bought these

plans. Whether they've raised an issue or were properly denied, received a benefit, each fact pattern is going to be materially different. So if we look at what the due process rights here to face the accuser and address them, then deciding just -- we could decide just the plaintiff's claims unless there are material issues they want to raise, but the first step has to be this Court's determination of whether a class is proper here and it doesn't -- the facts before the Court really don't satisfy any of the requirements of Rule 23.

THE COURT: Well, I'm not sure how due process would be impacted if we were to require dispositive motions on whether or not the contracts are substantively unconscionable. How is due process impacted there? How are you denied any of your due process rights?

MS. MORENCY: If the grounds for the motion are that they're substantively unconscionable because they are worded as will rather than shall, I'm a little at a loss for what the approach might be if we're talking about --

THE COURT: Well, the argument of plaintiff is or plaintiffs is that the contracts are substantively unconscionable because they are illusory. Isn't that an issue that would be susceptible to a dispositive motion?

MS. MORENCY: Your Honor, the plaintiffs would only -- I see where the Court is going with this. So if we -- but really it's within the Court's power to decide that in this

context of the class certification motion.

THE COURT: Well, we haven't had full briefing on that, have we?

MS. MORENCY: I, I believe we've had a great deal of briefing.

THE COURT: On the merits of whether it's substantively unconscionable? I don't think so.

MS. MORENCY: We could certainly brief it more extensively, but in the case before this Court on this motion, what we're faced with is the individual issues that would have to be addressed for not only this question of substantive unconscionability which itself is not a claim, but for everything else and the courts are very careful to say that the District Court shouldn't in the words of the O'Neill case, shave off a little issue that does not drive the conclusion and so in a class context where you're dealing with 50 states, some of which look at substantive unconscionability in the way these four plaintiffs do, others require substantive and procedural unconscionability, others require a sliding scale, there are so many issues to address if we're looking beyond these four people that this Court would, would need to address those issues again if plaintiffs renewed their motion for class certification after the summary judgment process.

THE COURT: Well, looking at all the issues that plaintiff has raised, what is really individual about whether

or not the contracts have a signature line or not? That's agreed I assume that there is no signature line, right?

MS. MORENCY: Factually it is true, there is not and there is not a single piece of authority before this Court in all of these binders from the plaintiffs that says that that make a contract unconscionable.

THE COURT: Well, that's a merits issue, right?

MS. MORENCY: Well, it bears on what your Honor is dealing with here because we're looking at what are the individualized issues that have to be addressed to evaluate an unconscionability claim for these [redacted] people and so one of the things that some of the cases look at is what did, for substantive unconscionability, let me just pull the standard out, what are the obligations imposed and is it fair that these are imposed, so it's an individualized inquiry to address anything beyond what happened to the four claimants if I'm understanding your Honor's question.

THE COURT: Well, I'm trying to come up with a way to look at this that makes some sense in terms of proceeding efficiently. Obviously I don't want to proceed in an inefficient fashion. I see and I'm not making a ruling now by any means, but just tentatively speaking, what I see is a series of secret issues that have been raised by the plaintiff of procedural and substantive unconscionability and there may or may not be merits to some or all of those issues, but that

hasn't been briefed. We touched on this very tangentially in connection with the motion to dismiss, but we certainly haven't fully briefed all of the issues and I understand now there's been some discovery and the issues have now been refined in some fashion. If it turns out that there are some asserted grounds for unconscionability that the Court could determine just lack of merit, then they just fall out of the case at that point and then I don't even have to think about would what extent would there need to be an individualized determination of that issue and to what extent does that changed the predominance equation. I would then be left with a set of procedural and/or substantive issues that I had found do have merit and then I could make a decision on whether or not class treatment is appropriate, so from that perspective, it seems to me bringing these issues together would make some sense. That's why I'm raising this.

MS. MORENCY: Your Honor, this is not the first Court to wrestle with this issue and there is some guidance for us in the case law because people have tried, for example, to certify an issue and what Dukes has told us and what O'Neill has told us is that the plaintiffs cannot end run the predominance requirement for the class they've enunciated and tendered to the Court by just shearing off, that was the phrase, shearing off issues. That doesn't obviate the need to look at predominance for --

THE COURT: But that's different issue though. That's where plaintiff wants to have the Court focus on one issue that has a class-wide treatment and make that drive the class certification analysis. I'm suggesting really something that's very different. I'm saying why don't we isolate the meritorious issues that plaintiff has and see whether then we have a basis for a class action.

MS. MORENCY: And if we think about what those are, your Honor, I think we can address them in the courtroom today because first, we have the actual wording of the plans. We've gone through what they say. They're not illusory either as drafted or as applied, informed by the covenant of good faith as the Court has diagnosed.

The second issue, the claim that by not signing a document it doesn't become a contract flies in the face of of every insurance policy issued in the United States because those form insurance policies that are sent after you've dealt with your agent and obtained a binder are not something that are negotiated or signed and the same is true of any warranty that you bought at The Apple Store or at Best Buy for the coverage. Signing a piece of paper is not required to form a valid contract.

THE COURT: Well, those are all interesting arguments, but is that somewhere in your brief? Have you made these merits arguments?

MS. MORENCY: Yes we have, your Honor. We've said that -- well, no. We haven't addressed the issue of the signature that Mr. Fink raised today. We'd be happy to offer supplemental briefing on that because there is a lot of learning. There's the whole shrink wrap doctrine that says it is a, in fact I was looking at it for another matter. I may -- I have such a case, your Honor, where the courts have said there is a common pattern in American commerce today where the person walks into a store and at an either in a consumer setting or in the insurance setting, obtains something, doesn't read it, takes it home, has time to look at it and digest it if they decide to read it and then the option is to return the product. Well, if that's what a consumer chose to do here and it's without question that each of these four consumers got their plan and read it and had the right to cancel it within 20 days or whatever days their state provided, then that is a common feature of American commerce. So there's nothing in the record before you that says that signing a contract is required or reading it at the cash register is required as long as --

THE COURT: Well, I don't have anything before me on the merits, right?

MS. MORENCY: You have the merits that the plaintiffs and defendants hoped to use to address the class certification inquiry, not summary judgment, but for today and the individualized issues that are presented before you are reason

enough to deny class certification this afternoon because what the Court has before you is, if we, let's focus for a moment on commonality which was a topic that counsel addressed at some length and the materials that you have before you say that it is the totality of the circumstances that the Court must address, that's Mr. Fink's own words when it comes to procedural unconscionability and substantively he said and I wrote it down because I wanted to make sure to remember it to talk with you about it. He said certain plans provide value. Well, if that's his acknowledgment, then a departure from that is an individualized inquiry for [redacted] people what value did they get.

So those, the concessions bring me back to the argument that I'd planned for you which was can the plaintiffs prove liability for unconscionability or unjust enrichment on a class-wide basis in this case? The burden is on them to have shown the Court how they would do that, to provide a trial plan and they didn't do it. They say they have a common claim, but it's really just a collection of common assertions. They say the plans don't mean anything, they're illusory on their face no matter what they covered, how long they lasted, whether claims were made, whether they were satisfied under a plan, so that common assertion doesn't set out the elements of a claim that can be decided on a class-wide basis and the concept of an illusory promise, really it's a nice phrase, but it's a

complete red herring on this record and we've talked about the ways in which there is a promise here and it has been performed in varying ways at substantial expense by Guardsman and so what the Court lacks here is any satisfaction of the burden by the plaintiff that the common questions are going to drive a common answer.

They do have a number of lists and bullets and I wanted to address those with the Court because those are really the types of lists and bullets that Justice Scalia warned against in the Dukes case. He says, well, the plaintiffs say in those lists that this is unconscionable because the Guardsman agreement is a form contract, it's take it or leave it, Guardsman doesn't notify people which is not true, no place to sign it, only Guardsman in these exclusive dealing arrangements as its competitors are in other stores, key terms aren't bold. So as we unpack the list, I am remained of what justice Scalia said which is the crux the case is commonality, the rule requiring the plaintiff to show that there are questions of law and fact common to the class. He says that language is easy to misread since any competently-crafted class complaint literally raises common questions and then he gave four examples that sound a lot like these.

In the Wal-Mart case he said for example do all of its plaintiffs indeed work for Wal-Mart? So we say does everybody have a Guardsman plan? Do our managers have

discretion over pay? It's like here, does Guardsman have discretion over what services to provide and in what order? Is that an unlawful employment practice? Here he's asking is an illusory contract. What remedies should we get and Justice Scalia goes on reciting these questions is not sufficient to obtain class certification because they are not common contentions that are going to drive with their truth or falsity an issue that is central to the validity of each one of the claims in one stroke so they can't determine unconscionability or unjust enrichment in one stroke on a class-wide --

THE COURT: Well, what about substantive unconscionability? Why isn't that driven with one stroke? Either the plans on their face are illusory contracts or they're not. Why isn't that an issue that is appropriate for class treatment?

MS. MORENCY: Because substantive unconscionability is not itself a cause of action, it's an element of a cause of action for unconscionability and so on a class-wide basis you would still have to consider and in the states that require a sliding scale or procedural unconscionability, you would have to determine those other issues and Guardsman is entitled as a matter of due process to respond on those issues and here where you have unquestionable disclosure of the plans insofar as Guardsman is able, they have requirements, they have policies, they have the, we've submitted to the Court the language in

Exhibit 13 of the Haverty's agreement which says retailer will make the plans available, then you're -- so if you're just driving the question of what did the plans mean, that is not sufficient to decide in one stroke a cause of action for any of the [redacted] people.

THE COURT: Well, let's take jurisdictions that require both substantive an procedural unconscionability. Let's say I could determine on a class-wide basis whether or not the contracts are substantively unconscionable and let's assume I can decide on a class-wide basis whether the absence of a signature is procedurally unconscionable, why doesn't that decide in one stroke the claim of unconscionability?

MS. MORENCY: Your Honor, procedural unconscionability requires a determination of the facts and circumstances of the acquisition of the plan, so we have Guardsman's policy that the plan be disclosed and any deviation from that is an individualized issue. That is how the cases fall out. So if the Court's deciding the plans have a commitment on their face and if the Court is deciding Guardsman has a procedure to make them available, then certainly we would have no quarrel with that, but if the Court is deciding to the contrary, it's not determining whether there is procedural and substantive unconscionability for a particular person as a, as any of these [redacted] people might require.

THE COURT: Well, if the practice is procedurally

unconscionable in any respect, would that not be sufficient to satisfy the element of procedural unconscionability?

MS. MORENCY: In which respect are you --

THE COURT: I just said if there's no signature line.

MS. MORENCY: But the lack of a signature line, I would submit there's no authority that that is procedurally unconscionable because we have those contracts all the time.

THE COURT: Well, again we're now drifting into the merits and we don't have briefing on that, but that's the contention of plaintiff. I'm just using that as an example. Take another example of there's no opportunity to negotiate. I know you think that that's not procedurally unconscionable, but that's the plaintiffs' argument and let's assume that we have a dispositive motion round and that I'm satisfied that they're right about that, so doesn't that decide the whole claim of unconscionability? If I rule that the contracts are substantively unconscionable because they're illusory and if I rule that they are procedurally unconscionable, doesn't that in one stroke then drive that decision on that claim, on the entirety of that claim?

MS. MORENCY: It doesn't take away the individual inquiry that we would have to make of someone other than these four people. So if for example someone were to go into a store to have the plan available to them, have read it, have it summarized for them in a fair way as three of the four

plaintiffs say they did here, then -- and even though they didn't sign it, they understood that that was going to be their commitment as these plaintiffs did here, they had commitments, the store had commitments, then you're into an analysis of the meaning of substantive unconscionability and the effect on these individuals that would make it inequitable to grant them relief if they knew that those were going to be the contract terms and that is how the terms were fulfilled.

THE COURT: Well, even if they knew what the contract terms were, if I were to find that it's procedurally unconscionable that they weren't allowed to negotiate over them, doesn't that give the plaintiff whatever they need on the unconscionability claim?

MS. MORENCY: It would your Honor, but it would be so wrong because --

THE COURT: Well, maybe it would. I'm not making a ruling, I'm just saying that's one of their arguments, isn't it?

MS. MORENCY: I believe that will be one of their arguments, but there are so any individual issues involved that it is not an argument --

THE COURT: Let me get back to what I'm saying. There may be certain individual issues on certain issues. There might be certain, for example the unjust enrichment may involve a panoply of individualized issues. On the other hand,

unconscionability may not, so maybe the sensible course here is to figure out who's right and who's wrong on the merits of these issues and then we can decide whether or not they're susceptible to class treatment.

MS. MORENCY: Your Honor, I really think that that in view of the case law puts the cart before the horse because what the courts try to do is determine early on what are the stakes of the litigation and to decide first an issue that's going to, with -- that might, but in our view won't affect the ultimate recovery of what later becomes a class member is not -- I think it leaves the Court with more in efficiencies than efficiencies.

THE COURT: But let me explore with you another issue that's related. Now you keep talking about it's an individualized treatment and your due process rights. We know that there often are class actions where individual claims are rejected because of certain circumstances that make the claimant ineligible for a recovery. Couldn't that be something that's built into the recovery phase? In other words if it turns out that it becomes relevant whether or not terms of the contract were actually delivered to a purchaser, isn't that something that we could determine as part of the recovery process to determine whether or not an individual was entitled? For example, the form for collecting could have a box to check whether or not somebody did or didn't receive terms or there

could be a mini-hearing in front of a master or magistrate judge if you actually wanted to cross-examine every claimant to see whether or not he or she had received a particular set of terms. It doesn't sound like it would have to be a very elaborate process to raise the kinds of individual claims as I understand them that you're talking about, the individual issues. So are there more elaborate individual issues you would want that you don't think we could handle in a recovery process?

MS. MORENCY: Yes, your Honor because in, let's say for example of unconscionability. So what you're looking at not only is a particular type of behavior, but causation on liability and also damages. So you're right that there are cases that deal with different damage determinations and can assign those to a special master where it's manageable, but it would not only be unmanageable here, but it would be inconsistent with Guardman's due process rights to leave to the checking of a box the question of discovery and probing of whether a potential class member actually had full disclosure and was caused any fact of injury which would have to be determined at the liability stage, not just in calculating damages. So what your Honor is postulating as a potential here would be invading Guardman's rights to defend on liability against absent class members and let's also think about the lack of manageability because we have [redacted] plans in

force so no special master would be able to get through the checking of boxes and the sending them back to people for further information, sort of mini-discovery on [redacted] claims. It is not only unmanageable, but it illustrates how unsuited this set of claims is for class treatment. It is not the superior method when there are alternatives that we've explained to the Court where not only does Guardsman make arrangements individually with customers, but it provides refunds. People have dealt with the, I mean, three of the four plaintiffs -- sorry, two of the four plaintiffs obtained their refund offers through the state Attorney General without needing to retain a lawyer at home. Now one of them, Corrine Hufflemeyer (phonetic), overlooked the refund offer and Mr. Briede decideed not to take it since he had already hired counsel, but there are more efficient methods and the fact that counsel commented that no one has had the resources to take on Guardsman? I would submit that the evidence is that no one has had the incentive to take on Guardsman since there's a 93 percent approval rating among the people with whom Guardsman actually deals. So there are more efficient mechanisms for dealing with this in the marketplace and with the governmental help of very well-meaning and well-functioning AG offices and it also just illustrates the contrast between that and what this hypothetical is of having a special master spend a lifetime administering [redacted] -- sorry, [redacted]

[redacted] potential claims of liability including causation and fact of damage. I mean, that would impair due process rights.

The other issues that I'd like to feature for the Court if I may, I think we have addressed this in part, but I want to make sure we emphasize. In the briefing that was submitted to the Court, there was much discussion the variety of state laws that define unconscionability and what the proper elements are so I won't repeat that or what's in the charts, but dealing with the plaintiff's accusations of substantive unconscionability reminds me how far we are from the presumptions we were exploring over a year ago on the motion to dismiss. There are obligations that Guardsman has undertaken. The uncontroverted evidence shows that the cleaning kits are something physically very different from the Haverty's furniture care kit. The evidence before the Court is that Guardsman sends outs between [redacted] and [redacted] cleaning kits per week and that although counsel believes I cannot distinguish between pictures of the cleaning kit and the actual physical cleaning kits, we brought him samples in case he would like to see them.

So the evidence before this Court is that there's a great deal of effort that goes on and the response that the plaintiff makes is in their reply at footnote four, page four, they think the plans are not a good value. They say they are exceedingly poor deals, but that's very different than saying that these plans are illusory and impose no obligations or that

they are substantively unconscionable on their face. To say that they're a poor deal, that only some plans have value really underscores for this Court the individual inquiry that would have to be made for each claimant who plans to bring a claim of substantive unconscionability.

With respect to unjust enrichment, counsel made a reference to this Court's past encounters with unjust enrichment and we read that case with interest. The product that's before this Court is very different from the false diplomas that were coming from the diploma mill. This Court has already noted in ruling on the motion to dismiss that in Florida there is no cause of action for unjust enrichment where there's a contract between the parties and so the Court has allowed that claim as an alternative to the Briede breach of contract claim and here I submit that the plaintiffs are being very strategic. They are neither dismissing nor seeking certification of their breach of contract claims that would leave their plans in place, but they are asking this Court to take action by trying to certify an alternative theory to void the plans of [redacted] other people and that inherently prevents individual -- presents individualized issues because the cause of action itself as this Court is well aware asks whether a defendant like Guardsman has retained a benefit under circumstances where it is inequitable or unjust to do so. Now that individualized issue has led most federal courts except

when dealing with false diplomas to refuse to certify a nationwide class based on the theory of unjust enrichment because the elements, the circumstances are going to vary materially and then have to be assessed factually on an individual basis.

There's a particularly helpful summary of the caselaw at least as of last fall in the Gustefson (phonetic) decision where the Court denied a decision to certify among other things a nationwide class on a unjust enrichment claim so there are both legal differences nationwide on what the elements are for unjust enrichment, whether it's available where there's a contract as there is here and then individualized fact issues.

We also note that there is another problem with the proposed class given that unjust enrichment is a restitutionary remedy. This class as it's before the Court today, the putative class is a nationwide class of everyone who bought a Guardsman plan within the last four or six or eight years depending on their Statute of Limitations. That enormous class doesn't take into account the fact that it includes both people who obtained a benefit and people who did not. People who have been allegedly injured like these four and people who have not and for those who obtained a benefit because it's restitution, there would have to be an accomodation of what benefit did they get and you can't just use Guardman's revenues as a proxy for what benefits were changing hands or even what went out the

door. It would have to be an individualized inquiry. Did they get a replacement on a 30,000 dollar couch or did they get advice on how to clean a stain and what was that worth to them to get another five years of benefit? So the individualized issues for unjust enrichment and for substantive unconscionability make this a case that does not satisfy the requirements for class certification.

THE COURT: Couldn't you just exclude anybody who received any kind of benefit?

MS. MORENCY: Well, your Honor, that's not the proposed class definition.

THE COURT: No, no. You can certify the whole class, but then when it came time for some recovery, you would exclude from recovery anybody who's received a benefit.

MS. MORENCY: Your Honor, the determination of that would require individualized issues. To determine who's in the class --

THE COURT: Why? Don't you have records that show who's received a benefit?

MS. MORENCY: Your Honor, there's -- there are records of those that had a technician visit and those would were given a coupon to go re-select, but the value of that benefit being calculated for, you know, [redacted] people is an enormous job and there is ample --

THE COURT: Why would you have to calculate? Why

couldn't you just have a rule that said anybody who's received any benefit can't participate in the recovery?

MS. MORENCY: Well your Honor, as a practical matter, if claims come in, let's say there are [redacted] claims and names are different, locations are different, somebody changed an address, the manageability even testing that, even against and I, you know, IBM and Google's computer systems, let alone one in Grand Rapids that tries its best, it would be wholly unmanageable to do that and it would interfere with Guardsman's due process rights to put that burden on them to say that we must go out and determine who's had a benefit, who's been caused an injury.

THE COURT: Isn't that in your records which of your customers have received some kind of benefit?

MS. MORENCY: There are records that go back some years that will show if someone had a tech visit, had a follow you have tech visit. It doesn't necessarily reflect who thought that was the right benefit or the exact amount that was paid for that visit. It doesn't show the value of the furniture that they went and re-selected, if there's a credit open with the retailer because Guardsman sends them back to the retailer to get the, you know, whatever replacement if they're at that stage.

THE COURT: Couldn't you just exclude anybody that had a technician come out or who had had any kind of benefit

received, a coupon, a credit, replacement of furniture?

MS. MORENCY: Your Honor is really redefining the class as we stand here. It's not the class before you and --

THE COURT: No, no. The class would be certified the way plaintiffs are talking about, but in terms of the recovery, you can make all these adjustments you wanted. You could say we're not going to send a claim form to anybody who had a technician's visit, they just don't recover. Why couldn't we do that?

MS. MORENCY: It really begs the question under Rule 23(a). It's really illustrating the individualized issues that make class treatment inappropriate. We can deal with these four people. We know what their claims are. We should be entitled to deal on the same basis with anybody else who comes forward, but on an individual claim there's really no driver, there's no rationale, no satisfaction of the burden under Rule 23(a) to show that with one stroke the Court can determine liability including causation and fact of damage for an individual claim.

THE COURT: Okay. Let me give you a two-minute warning unless you've wrapped up at this point.

MS. MORENCY: Thank you, your Honor. Your Honor, in connection with the state claims we wanted to note that the same factors that weigh against certifying a class on unconscionability and unjust enrichment also weigh against

doing so in the four state Consumer Protection Act claims. That's true in Michigan where a claim under the Michigan Consumer Protection Act as the Court is aware requires proof of deception, reliance, causation and actual damages which are inherently individualized issues. The same is true in the other states and in the O'Neill case where the Court denied certification under Florida law, the listing of reasons why those could not be evaluated on a class-wide basis I think are persuasive and relevant to the facts presented before this Court. Similar analysis applies to Missouri and to New York where the only cases where presuming reliance is permitted are fraud in the market cases which this obviously isn't.

So your Honor, what we have before you is two causes of action that have very subjective and individualized elements. Those causes of action can't be determined on a class-wide basis. In the fundamental conclusion of any analysis of a motion for class certification is the question could the Court try one claim for the plaintiffs and resolve the claims of [redacted] other people and I would submit that what's been submitted to the Court doesn't permit that. You can't check all the boxes on a cause of action in a courtroom and the idea of doing it in a special master's office to fill in the blanks for liability and damages really illustrates how this is inappropriate for class treatment. The superior method is the individual actions that are before you

or the Attorney General methods and otherwise as a matter of due process, measuring [redacted] individual claims against the laws of their applicable states makes this inappropriate for class treatment. Thank you.

THE COURT: Okay, thank you. All right, Mr. Fink, I'll give you 10 minutes for rebuttal.

MR. FINK: Okay, your Honor. I can do that very fast. First -- if the Court doesn't mind, I will start right now.

THE COURT: Go ahead.

MR. FINK: I'll go in reverse order. This last issue we heard about the Consumer Protection Act. The very basis of these consumer protection acts in all states was to get by the issue of how difficult it was to prove fraud through reliance on an individual basis. The statutes have various different components and many of them if not most are based on objective standards for the reasonable person and there's a ton of law on that. The Dix case which came out, American Bankers and Dix case which came out early on made that very clear in Michigan, but it's true in the other states and the law is plenty. There have been plenty of class actions certified. There wouldn't have been if it were true that reliance is required in each one of those cases.

I think if we take the argument, the broad themes of the argument we just heard from defendant, what we really heard

was her client wants due process which is impossible for her client to get because they're so big. Her client is entitled to individualized determinations of all [redacted] claims and because of that, there can't be a class. Now if they only had 8,000 warrantees out or plans out there, I'd suppose she's saying it would be okay, but the fact is there's a ton of law, there are plenty of references in the cases that say just because you're big, just because you're big doesn't mean you can't be sued in a class action.

Now the suggestion was made that the answer is to go to the attorney generals of the state. You talk about an alternative, you've got an individual who can just be a member of the class by not opting out or in the alternative they can bring a formal claim with their Attorney General, go through a process and what we've already learned in this very case is that when our client, our first client, Mr. Briede, brought his claim, he didn't get a result from the Attorney General. What he got from the Attorney General was that a commitment was made by Guardsman, they made an offer to offer and that was addressed in fact in this Court's ruling on the motion to dismiss. There is absolutely nothing efficient about going to the Attorney General, but here's where we really seem to have gotten lost in this or counsel has and that is the suggestions made that the term in one stroke from Justice Scalia, that that term means the entire case is disposed of, that you've resolved

liability, resolved damages, resolved everything. Not at all. The basic principles of class action law under 23(a) have not changed and the Court has said that the basic underlying principles are still the same and one of the those principles is that if you have a common issue which will drive the litigation forward which is significant and central to the litigation, it doesn't have to be central, but that would significantly drive it forward, then a class is appropriate. In this case, we have specific decisions that can actually dispose of the case in most instances with this exception of how do you determine damages and yes there will be some issues on remedial, remedial issues, but shockingly simple in this case compared to most cases because in this case we know who had a plan and she says maybe they can't find those. If they can't find them, apparently they don't have a plan anymore, but the fact is they do have a process of locating these people and if they do have that information, they are keeping for their own business purposes. They know if they've already sent out a cleaning kit. Fine, give them a [redacted] credit if they sent out a cleaning kit, but that's a merits thing and remedies think way down the road. Maybe they bought them new furniture? Well, those folks no doubt aren't going to get anything because they got a benefit. For their unjust enrichment, they clearly had a significant benefit and so it's not fair to say that. The fact is this is really very straight forward. They got

[redacted] policy-holders if you want to call them that and they say that about [redacted] times a year they deal with something substantive for these folks that goes beyond understand just answering something on the phone.

So your Honor, I wanted to just talk about couple of specifics. Counsel suggested that I said totality of the circumstances suggesting that you have to look at each transaction? No. What I was saying was you look at procedural unconscionability in terms the totality of the information that we have and what we had is a situation in which there's not just no signature, it's a take-it-or-leave-it deal. There's no choice. They've set it up so you don't have an option to go to another company. They do not have a policy to ensure that the consumer gets to see the plan. They don't have that policy and they have clearly acknowledged that they really don't highlight the key terms so much so that today counsel wants to read to us from the contract and say that this contract has mandatory requirements because it says will, not, shall, but it still says will. Let's be clear. The language that was read was if a stain or damage listed in what is covered occurs during the term of this protection plan, Guardsman agrees to provide service as outlined in the service procedure section. We all had this when we were in court before and the Court's already addressed this issue in the motion to dismiss. The service procedures that you're referred to are where the complete

discretion rests. If Guardsman determines a reported stain or damage is covered, it will perform one or more of the following and here's where we get to the one or more the following includes the cleaning kit, but it's provide a cleaning kit or advice. It doesn't say they must provide a cleaning kit and by the way as far as these cleaning kits, yes we would like to see them, but the reason we would like to see them is we've been requesting them for months and they've been giving us all kinds of reasons why they wouldn't give them to us. It doesn't matter what the cleanings kits do because -- or what the cleaning kits are because those cleaning kits are still of just nominal value at best and as they say, they sent out [redacted] to [redacted] a week, so over the course of a week they send [redacted] to [redacted] times, they've got [redacted] plan-holders, [redacted] plan-holders and they've spent if it's, call it [redacted] a plan, there's -- a cleaning kit, they're spending between [redacted] and [redacted] dollars a week in providing benefits with these cleaning kits. So your Honor, that is clearly not the answer to establishing that there's value.

I don't understand. Counsel has suggested that the argument that this is illusory is a red herring? That's the heart of our argument. We've made it all along. We've been clear all along. This isn't knew. All of these discussions that we've heard today about due process, all of those discussions regarding due process are just a broadside attack

on class actions. This is -- this has all the makings of a class action and it's absolutely true. If there was no Rule 23, this would be a fascinating debate, but there is a Rule 23 and it says when there are common issues and we've identified what those issues are and those would move the case forward, then it is appropriate. In fact, it is required that a class be certified in that context.

Now they talk about shaving off a little issue? I won't waste much time on that, but a little issue? Illusory contract? Unconscionable contract? That's not a little issue. None of these things are little issues. They go to the heart of what's here. The little issue cases are cases where somebody tries to bootstrap something in. We did not shave off a little issue. This is what the entire case is about.

I didn't -- counsel -- oh, I already addressed the no signature issue, yeah. Counsel says it's not just no signature. Well, that's true, there are contexts, but not in the full context of what we've had and counsel suggested they'd give you cases. We didn't hide this issue. We have addressed this issue from the very beginning of the case, so I don't see where there's anything necessary on that.

Now I do want address something very important because she -- I said something and apparently I confused counsel and I hope I didn't confuse the Court when said it was possible that certain plans have value. I'm going to take a

moment. I'm going to slow down and be very specific about this. In the affidavit from Mr. Graff if this Court accepts that affidavit, in the affidavit from Mr. Graff for the first time they attached several policies making some arguments about them. Out of their 125 policies, I did see one that related to adjustable beds and that particular policy that related to adjustable beds said in certain circumstances Guardsman will do the following. It didn't seem to have quite as much discretion as we've seen in all the other policies, but that's not a problem. What that means is if the class is certified and they're able to show that as to those individuals who bought that policy, that those individuals got something that wasn't illusory, fine, they got something that wasn't illusory. They're either -- either the class is refined or they're -- or a determination is made on what relief or lack of relief goes to those people with those contracts. By the way, it's a small sub-set obviously of what we're dealing with because we didn't even hear about it until just now. I don't even know because we haven't looked closely. We don't know what all of the terms are related to those contracts, but it does appear that they might, but if a company has [redacted] policies out there, [redacted] plans out there and 100 of them provide some actual non-illusory benefit and [redacted], I'll never get to it, [redacted], I -- whatever, the rest, umm, [redacted] of them provide an illusory benefit, that doesn't

stop the class from being certified. That's an issue to address at a later time as we go through the case. If they want to make that defense as to them, they can present that defense.

Now your Honor, the -- counsel said that she was going to tell you about a lot of individualized issues, but in the end the only individualized issues they talked about was whether there was anything received and we've already dealt with that because there are records to show that and we can deal with that at the remedy phase and possibly they would argue as the Court was addressing that in, that maybe the procedure that somebody experienced in one store was different than in another, but that doesn't wipe out all of the other unconscionability arguments, all of the other procedural unconscionability arguments and if it turns out that one particular company had a -- retailer had a different policy for how they presented the information, that's a defense that they can raise. They're not being barred from raising that defense or presenting that defense as to certain members of the class. They can do that. They can say that we're going to draw a distinction, it's going to be necessary to have sub-classes if that happens, but when you've got [redacted] people involved, that shouldn't be a big surprise. So --

THE COURT: Okay. Big finish, one minute to go.

MR. FINK: Your Honor, thank you for the time. We

appreciate the opportunity to argue.

THE COURT: Okay. I want to see counsel back in my chambers. Thank you.

(Motion hearing concluded at 4:29 p.m.)

-- --- --

C E R T I F I C A T E

I, David B. Yarbrough, certify that the foregoing is a true and correct copy of the transcript originally filed with the Clerk of the Court on September 17th, 2014, and incorporating redactions of personal identifiers request by the following attorneys of record or parties: Jeannice D. Williams in accordance with Judicial Conference policy. Redacted characters appear as a black box in the transcript.

10/29/2014
Date

/s/ David B. Yarbrough

David B. Yarbrough, CSR, RPR, FCRR
231 W. Lafayette Blvd.
Detroit, MI 48226